BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

COMMENTS OF ALLEGIANCE TELECOM, INC.

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Allegiance Telecom, Inc. ("Allegiance"), by its attorneys, hereby submits these comments in response to the Notice of Proposed Rulemaking[1] in the above-referenced proceeding.

I. INTRODUCTION

The local competition provisions of the Telecommunications Act of 1996 are perhaps unique in the history of federal statutes. They establish the promotion of local competition as national policy. But to achieve this goal, they require that the ILECs cooperate in providing essential wholesale inputs to their competitors in ways designed to diminish and ultimately eliminate the ILECs' market power.

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[1] *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001) ("NPRM").

This is not something the ILECs currently have any great incentive to do. As the Commission well knows, the ILECs will exploit every ambiguity in the law to evade their obligations and discriminate against their competitors. Even if the legal requirements are clear, the ILECs will view financial sanctions as a cost of doing business when such sanctions are not stiff enough to outweigh the long-term benefits of maintaining market power.

For the 1996 Act local competition provisions to work, the ILECs' behavioral obligations must be defined in clear, detailed, and comprehensive rules. Such rules must evolve to address new opportunities for ILECs to engage in anticompetitive behavior as their networks change and as the needs of competitors change. Violations of the rules should be easy to detect. Upon detection, the punishment must be certain, swift, and severe enough to outweigh the substantial benefits dominant firms receive from raising their rivals' costs.

These are not aspirational goals. The statute does not make compliance with the Section 251 obligations optional for ILECs. Nor does it instruct the Commission to settle for something less than the required standards for wholesale service if it finds that regulations are becoming onerous for the ILECs. The question is not, as the NPRM suggests, whether a particular regulatory regime increases the ILECs' regulatory burden. The ILECs have been and continue to be enormous *beneficiaries* of regulation. It was regulation that gave them protected monopolies for the better part of a century, and it was regulation that therefore allowed them to construct their networks and to achieve the economies of scale and scope that form the basis of their market dominance. Moreover, it has been the regulatory regime since passage of the 1996 Act that has allowed the ILECs to maintain their market power because of inadequate enforcement and has sheltered ILEC monopoly profits from competition through rules such as those adopted in the *CALLS Order*.[2] To speak in terms of the ILECs' overall regulatory *burden* is therefore utterly counterfactual. But it is also beside the point. Congress has chosen an inherently regulatory mechanism of introducing competition. One could of course imagine other means it may have employed, such as structural separation of wholesale and retail ILEC operations. But Congress chose behavioral regulations. These regulations are *supposed* to be a burden to ILECs because they are designed to ensure efficient and sustained entry that should logically result in the diminution of ILEC market power.

The focus of this proceeding should therefore be to determine what is the optimal use of the Commission's resources to increase the likelihood of ILEC compliance with the requirements of Section 251. As explained below, the optimal approach is for the Commission to establish performance measurements, standards, and reporting requirements based on best practices from around the country. To ensure that the states continue to have the flexibility to develop and refine their own behavioral rules, the federal rules should apply only in states that do not have rules that match or exceed the federal requirements. The federal rules should also form the basis for the imposition of financial penalties, in addition to those applicable in the states, designed to make anticompetitive behavior unprofitable and to ensure viable and sustainable competition.

II. THE COMMISSION'S PROPOSAL TO ESTABLISH NATIONAL PERFORMANCE RULES IS AN IMPORTANT AND TIMELY NEXT STEP IN ITS IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS OF THE 1996 ACT.

As the Commission recently recognized in the Broadband NPRM, there are two ways in which a firm with market power (such as an ILEC) can raise its rival CLECs' costs and restrict

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2 *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order; Report and Order; Eleventh Report and Order, 15 FCC Rcd 12962 (2000) ("*CALLS Order*").

their output.[3] First, an ILEC can raise the prices CLECs pay for inputs. Although this strategy remains a serious concern, the Commission's TELRIC rules and state implementation of those rules at least establish a specific framework for preventing unreasonable prices.

The second way in which ILECs can raise their rivals' costs is by providing inputs on discriminatory terms and conditions by denying, delaying, or degrading those inputs. As Professor Marius Schwartz has explained, non-price discrimination "is generally an even more destructive form of rivalry than over-pricing of inputs." Schwartz at 260. While "[b]oth tactics artificially reduce competitors' outputs (or discourage competitors from expanding or innovating)," non-price discrimination is worse because it "also inflates competitors' costs for the output they continue to provide, or degrades its quality." *Id.* Moreover, where the Commission and state rules restricting the ILECs' opportunities to raise prices to unreasonable levels are effective, the ILECs have strengthened incentives to find ways to raise their rivals' costs through unreasonable and discriminatory wholesale practices. As Professor Schwartz describes it, "regulation often is more capable of constraining an incumbent's price than non-price conduct, thereby biasing exclusion to take more wasteful non-price forms." *Id.* at 261. To make matters worse, as the Commission has found, the larger the ILEC's territory, the greater its incentive to engage in discrimination, since a larger territory allows an ILEC to capture a greater benefit from discriminatory behavior.[4]

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3 *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, FCC 01-360, ¶ 28 (rel. Dec. 20, 2001) ("Broadband NPRM"); *see also* Marius Schwartz, The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets, 18 Journal of Regulatory Economics 247, 260 (Nov. 2000) ("Schwartz").

4 *See Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 60 (1999) (noting that the merger "would increase the incentives and ability of the larger merged entity to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC. . . .

It is therefore clearly appropriate for the Commission to review the extent to which federal performance rules and self-effectuating penalties could diminish the ILECs' opportunities and incentives to engage in this non-price anticompetitive behavior. Although the Commission has thus far relied almost exclusively on the states to establish performance measurements, standards, and reporting requirements (collectively, "performance rules") and penalties,[5] there is now a basis for appropriately tailored federal intervention. After several years of experience (mostly at the state level) developing performance rules, regulators and carriers have a good sense of which performance measurements of wholesale service are most important to determining whether an ILEC has met its statutory obligations under Section 251(c). *See* 47 U.S.C. § 251(c). Although, as explained more fully below, the list of performance measurements discussed in the NPRM should be altered somewhat, it nonetheless includes many measurement categories, such as the timeliness of firm order confirmations, mean time to repair and so on, that have become cornerstones of the state and federal Section 271 proceedings. Regulators and carriers also have significant experience in developing and applying specific standards for these measurements. Again, this is an area in which the Commission is unlikely to see a consensus among the ILECs and competitors. But the areas of controversy have been narrowed quite significantly, and the Commission has enough experience in assessing the merits of specific standards that it is well-placed now to make some judgments in this regard.

The increase in the number of local areas controlled by SBC as a result of the merger will increase its incentive and ability to discriminate against [competing] carriers") ("*SBC-Ameritech Merger Order*").

[5] As used in these comments, the terms performance measurements, standards, benchmarks, and reporting requirements have the meanings attributed to them in the NPRM. *See* NPRM at n.2.

Furthermore, after about five and a half years of operating under the basic framework established by the First Report and Order in the Local Competition proceeding,[6] including numerous Section 271 proceedings, the industry has accumulated a fairly significant list of ILEC best practices. This record is critical because it provides concrete evidence that ILECs have achieved a given level of accuracy or timeliness in a particular measurement or have been able to adopt a given set of business rules for a performance measure. Where one ILEC is able to do something, the others should be able to as well.

It is in contexts such as this, where standards for behavior have been established and actually met in the real world, that regulatory intervention is most likely to be effective. Indeed, this is the fundamental logic underlying the Section 271 checklist. The idea is of course that the BOC must show that it has actually met a certain level of performance in the provision of wholesale services before it may enter the in-region interLATA market. Regulators then must ensure that the BOC continues to meet that level of performance after Section 271 approval has been granted. Once the BOC has demonstrated that it can actually do something, it can no longer rely on the tried and true arguments of the regulated dominant firm – that it is technically impossible or prohibitively expensive or would threaten the integrity of the network to comply with a certain requirement. *See* Schwartz at 268.

In sum, this proceeding addresses a critical gap in the federal regulatory regime. It also comes at a time when the Commission can draw on the knowledge of state regulators and the industry, as well as its own substantial experience in overseeing and reviewing performance rules and penalties.

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6 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11

III. NATIONAL PERFORMANCE RULES SHOULD ESTABLISH A BASELINE SET OF PERFORMANCE RULES AND PENALTIES AND SHOULD FORM THE BASIS FOR INCREASED COMMISSION ENFORCEMENT.

The Commission must ensure that whatever performance rules and penalties it establishes in this proceeding do not preempt or undermine sound state performance rules and penalty plans. However, federal performance rules must apply where the state rules are not adequate. Federal enforcement must also apply where state enforcement, by itself, does not give ILECs an adequate incentive to comply with the performance rules.

A. Federal Performance Rules Should Fill Gaps In State Rules And Should Apply In Commission Enforcement Proceedings.

As the Commission recognizes in the NPRM (¶ 4), the state regulatory commissions have done a great deal of work and accumulated a vast amount of experience in developing and enforcing comprehensive performance rules. Indeed, in the Section 271 process, the Commission has been forced to rely heavily on the performance rules enacted by the relevant state to determine whether the BOC in question has complied with the requirements of Section 251. The Commission has placed special reliance on the so-called "anchor" states such as Texas and New York, which have sometimes become *de facto* regional regulatory commissions for the purposes of establishing performance rules. For example, all of the states in the Southwestern Bell region have adopted the Texas performance measurements with minor alterations to meet the specific circumstances of the particular state. Moreover, the state commissions have continued to refine their performance rules after they have been established. Texas and New York have both, for example, conducted follow-up proceedings after Section 271 approval in

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FCC Rcd 15499 (1996).

which they have refined their performance rules based on the experience of applying those rules in the real world.[7]

The states are especially well-placed to take the lead in developing performance rules. To begin with, most states have conducted or are in the process of conducting Section 271 proceedings. These proceedings are of course detailed and lengthy. The states must take the time to understand in intimate detail the BOC's wholesale processes. The Commission, by contrast, has no such opportunity, since it is constrained by the statutory time limit of 90 days for reviewing Section 271 applications. *See* 47 U.S.C. § 271(d)(3). Moreover, the states also acquire further expertise as to all ILEC wholesale operations (except those rural ILECs not subject to Section 251) in carrying out their statutory responsibilities under Section 252 to arbitrate and approve interconnection agreements. *See* 47 U.S.C. § 252(e). In fact, in many states (such as those throughout the SBC region), performance rules are made available through standard interconnection agreements.

There are also important considerations of federal-state comity, of which the Commission is well aware. Now more than ever, the Commission must share responsibility with the states in advancing the goals of the Communications Act. There are many critically important areas (such as universal service, numbering administration, and the application of Sections 251 and 252 in interconnection agreements, just to name a few) in which the Commission must rely on the states for assistance or leadership. Federal-state cooperation is therefore critical, and it would be

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[7] *See, e.g., Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies*, Order Modifying Existing and Establishing Additional Inter-Carriers Service Quality Guidelines, Case 97-C-0139 (rel. Oct. 29, 2001) <http://www.dps.state.ny.us/fileroom/doc10699.pdf>; *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas; Implementation of Docket Numbers 20226 and 20272*, Order Nos. 13, 15 Approving Modifications to Performance Remedy Plan and Performance Measurements, Project Nos. 20400; 22165 (rel. July 24, 2000) < http://www.puc.state.tx.us/telecomm/projects/20400/ 20400arc/072400ord.pdf>.

unwise to undermine such cooperation by preventing the states from continuing the important work they have done in establishing performance rules.

Based on these concerns, the Commission must be clear that it will not broadly preempt existing state performance rules in this proceeding and replace those rules with a set of federal requirements. Rather, it should design the federal performance rules as complementary to the state rules. The federal performance measurements, standards, and reporting requirements should function as a baseline set of best-practice requirements that apply in states without adequate performance rules. Specifically, where the federal requirements apply to a particular wholesale functionality (for example, percentage of due dates met for UNE loops), that federal requirement should apply in states with no performance rule governing that functionality. In addition, the federal rule should preempt any state performance standard that is less exacting than the federal rule. If and when a state adopts a performance standard applicable to the functionality in question that either *equals or exceeds* the federal standard, the Commission should not preempt the state rule. In such cases, the state measurement would obviously need to be identical to or be very similar to the federal measurement. In addition, the federal performance rules should allow states to continue to adopt performance rules concerning wholesale functionalities that are not covered by the federal rules.

B. The Federal Performance Rules Should Include Core Measurements Designed To Ensure The Growth Of Facilities-Based Competition.

The Commission should promptly adopt measurements and standards that track ILEC performance in the most important aspects of wholesale service. In so doing, the Commission should function as a clearinghouse for ILEC best practices and for CLEC input based on experience in the marketplace. The Commission should establish a presumption that a best practice from one ILEC is mandatory for all other ILECs subject to the performance rules. This presumption should only be rebuttable where an affected ILEC can demonstrate that it is technically infeasible for it to meet the best practice in question.

1. The Federal Performance Rules Should Include Thirteen Core Performance Requirements Targeted To Facilities-Based Competition.

The Commission should adopt a core group of performance measurements and standards to ensure that facilities-based competitors have access to wholesale inputs on just, reasonable, and nondiscriminatory terms and conditions as required by Section 251(c) of the Act. Allegiance proposes thirteen performance rules that would, if adopted, significantly improve the ability of regulators to detect, punish, and deter discrimination. Although the Commission should be guided by what the states have done in Section 271 proceedings, it can and should make an independent determination as to what is the appropriate standard in its consideration of federal performance measurements and standards.

Indeed, for the benchmark standards proposed by Allegiance, parity would not ensure access on just, reasonable, and nondiscriminatory terms and conditions as required by the statute, nor would it ensure that consumers reap the benefits of a competitive marketplace through improved service. First, a parity standard would not allow CLECs a meaningful opportunity to compete because in many cases ILEC retail service quality is so bad that a parity standard would simply force CLECs to the "lowest common denominator."[8] Customers already unhappy with poor ILEC quality will be reluctant to change to another carrier with equally bad service. Unable to meet the minimal levels of acceptable quality for aspects of service controlled by the ILECs,

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[8] *See, e.g., Anne Colden, Qwest Agrees to Settle in Utah, Oregon Service Lawsuits, Denver Post, Oct. 31, 2000 at C1, 2000 WL 25832706, Aaron Baca, Phone Settlement Raises AG Concern, Albuquerue, J., Oct. 31, 2000, at A1, 2000 WL 29063279; available at* LEXIS, News Group File; *Ameritech to Grant Wisconsin Refund*, CHI. SUN-TIMES, Oct. 25, 2000, 76 2000 WL6701318.

new entrants would have no opportunity to differentiate their services from the incumbents in the marketplace. Nor would consumers benefit from the improved service quality that competition is intended to produce. Second, parity of service quality often does not allow CLECs a meaningful opportunity to compete because of state monetary penalties for poor retail service quality that apply to all LECs.[9] Where a CLEC is dependent upon the ILEC to make repairs to a customer's service, the ILEC's failure to perform in a timely manner subjects the CLEC to penalties. As explained *infra*, state penalties applicable to all LECs for failure to meet maintenance and repair intervals illustrate this point.

In any event, to the extent that the Commission ultimately concludes that a performance benchmark is not appropriate for a particular measurement, it should ensure that ILECs provide parity of service quality to competitors. Where an ILEC retail analogue exists, parity is the floor below which ILECs simply cannot be allowed to go.

Below is a brief summary of the proposed measurements. In addition, examples of best practices currently implemented by ILECs are included in the discussion of relevant measurements. A more detailed description of each measurement, its standard, and related business rules is included in Appendix A to these comments.

i. Percent On Time LSRC/FOC

The "Percent On Time Local Service Request Confirmation ("LSRC")/ Firm Order Confirmation ("FOC")" is a core measurement of ILECs' compliance with their duties under Section 251(c)(3) to provide access to UNEs on terms and conditions that are just, reasonable, and nondiscriminatory. *See* 47 U.S.C. § 251(c)(3). States and the Commission have routinely

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9 *See* 22 Ill. Comp. Stat. 5/13-712(e)(1); 83 Ill. Admin. Code Sec. 732.30(a) (requiring a carrier to credit the customer if it fails to repair an out-of-service condition for basic local exchange service within 24 hours); Ohio

included similar measurements in reviews of Section 271 applications.[10] The Commission has accepted states' judgments that there is no retail analogue for this function and therefore a benchmark standard would be a reasonable measurement of ILEC nondiscrimination in providing access to UNEs. This is the appropriate approach for federal performance rules as well.

In developing this measurement and the corresponding benchmark standard, the Commission must focus on the critical role of facilities checks in the context of FOC timeliness. CLECs experience high volumes of jeopardies after receiving order confirmations for loops because the ILEC systems generally send order confirmations before checking to determine whether facilities are available. *See also Texas 271 Order* ¶ 173. As a result, the CLEC often informs the customer of the committed due date received in a FOC only later to be informed by the ILEC that the order has been placed in jeopardy status due to lack of facilities. The CLEC is then forced to reschedule the installation date, and the customer understandably blames the CLEC for circumstances wholly within the control of the ILEC.

To address this problem, an LSRC or FOC should not be deemed timely unless an ILEC has performed a facilities check prior to issuance. This type of facilities check is well within the ILECs' capabilities to accomplish. For example, Pacific Bell has implemented a procedure to

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Admin. Code Sec. 4901:1-5-16 (requiring customer credits for local exchange service outages).

[10] *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 164 (1999) ("*New York 271 Order*"); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶ 172 (2000) ("*Texas 271 Order*"); *see also* NPRM ¶¶ 39-40. Indeed, both Verizon and BellSouth have proposed measurements designed to measure FOC timeliness. Verizon has proposed "% On Time -- LSRC." *See Ex Parte* Letter from Dee May, Verizon, to Magalie Roman Salas, FCC, in CC Docket No. 96-98, at 3 (Oct. 16, 2001) ("Verizon Oct. 16, 2001 *Ex Parte*"). BellSouth has proposed a "FOC

perform facilities checks for CLECs prior to issuance of a FOC. Pacific Bell provides a facility verification process in which CLECs may check the availability of facilities in advance of placing an order and reserve for 30 days facilities found to be available. Pacific Bell's response to a facilities check request includes information regarding availability of facilities and the relief date if facilities are not available, whether some but not all requested facilities are available, and the reason why facilities are not available. Response time is generally within 24 hours. It is a good example of a best practice that the Commission should extend to other ILECs. This is only likely to occur with regulatory intervention, as is illustrated by the fact that SWBT denied Allegiance's request that it apply the pre-order facilities check to all SBC companies. SWBTs only reason for the denial was that the process is too burdensome. Indeed, Pacific Bell's process is not ideal, since the manual nature of inquiries, by fax or e-mail, is relatively slow. A process in which the CLEC could itself conduct an electronic facilities check would be more efficient. Nevertheless, the existing Pacific Bell process provides CLECs with critical information in a timely manner to communicate a realistic installation date to the customer. Such information is especially important during customer moves or when a customer adds new locations/offices.

As demonstrated by Pacific Bell's performance in complying with this best practice, ILECs should be subject to a 48-hour maximum benchmark period for FOC delivery after a facilities check, moving toward a goal of a 24-hour FOC with facility check when this process becomes electronic. This should be ample time to perform a facilities check and respond with a FOC. For example, Pacific Bell generally responds to a pre-FOC facilities check request within

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Timeliness" measurement. *See Ex Parte* Letter from Robert T. Blau, BellSouth, to Magalie Roman Salas, FCC, in CC Docket No. 96-98, at 3 (Nov. 2, 2001) ("BellSouth Nov. 2, 2001 *Ex Parte*").

24 hours and returns FOCs for UNE orders in less than four hours.[11] A 48-hour standard for a FOC with a facilities check is therefore a generous standard that other ILECs should be able to meet. However, if the Commission chooses not to impose a facility check requirement, ILECs should be required to return FOCs within 24 hours, again a generous standard based on Pacific Bell's practice.

Moreover, ILECs should be required to reconcile their databases so that the facilities checks are accurate. ILECs generally do not follow standard and consistent procedures for porting CLEC customers back to the ILECs. They often fail to record the fact that a CLEC's circuit facility assignment or "CFA" is no longer used for a ported customer.[12] Where the ILEC's records are not updated to show that the CFA in question is no longer used by a CLEC customer, the ILEC continues the bill the CLEC for the unused facility. The ILEC's records also indicate that the facility assigned the CFA is unavailable for new customers, thus causing the ILEC to deliver unwarranted reject notices to the CLEC. The long term solution to this problem is the adoption of a standard process for ILECs to follow when porting customers back from CLECs. In all events, however, ILECs must be required to conduct regular database reconciliation. As an example of the need for these reconciliations, Allegiance recently completed a cooperative project with Qwest in which 959 facilities were cleared. As a result, Qwest credited Allegiance retroactively and updated the database so that these facilities would no longer result in a false reject notifications.

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[11] In the fourth quarter of 2001, Pacific Bell returned LSRCs to Allegiance on UNE orders in an average of 3.3 hours. Moreover, these FOCs are highly reliable because Pacific Bell has implemented a procedure to resolve multiple errors on a single LSR. *See* Section III.B.1.ii, *infra*, for a discussion of serial rejects on the same orders.

ii. Serial Rejects on Same Order

When a CLEC submits an LSR, ILECs in many cases respond with a rejection citing one, but not all, of the errors in the LSR. When the CLEC corrects the error identified in the rejection notice and resubmits the LSR, the ILEC will then send another rejection notice, citing a different error in the original LSR. This practice is of course completely unnecessary, because the ILEC could just as easily deliver a single initial rejection notice citing all errors with an LSR. Where this practice is not followed, CLECs' orders are delayed and their service quality degraded. To address this problem, the Commission should adopt a "Serial Rejects on Same Order" measurement that would measure and create a performance standard for the repeated rejection of an order by an ILEC due to CLEC entry errors. This measurement would track the extent to which an ILEC reviews an entire order for errors before rejecting it and the extent to which such rejections include appropriate reason codes to allow the CLEC to correct all erroneous entries at one time.

This is a reasonable measurement. Two ILECs -- Qwest and Pacific Bell -- have implemented procedures to minimize LSR rejects caused by CLEC-entered errors. Allegiance experiences a very low percentage of serial rejections in the Qwest region because Qwest quality control representatives review the accuracy of the entire order before sending a response to the CLEC. Under the Pacific Bell procedure, a Pacific Bell representative reviews an order and then telephones Allegiance if there is more than one error on the LSR or if additional clarification of the order is needed by Pacific Bell. Again, these procedures are not perfect. The Pacific Bell procedure, for example, would be more efficient if all communications were automatic and

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[12] The CFA identifies the jumper cable (sometimes called the cross-connect) connecting the ILEC's main distribution frame to the CLEC's collocated equipment.

electronic (with an opportunity for clarifying telephone conversations when needed). Nevertheless, these examples show that it is fully within the ILECs' ability to avoid serial rejects. Their success in doing so should be the subject of federal performance rules.

iii. Timely Jeopardy Notifications

As the Commission has recognized, "[a]fter a competing carrier has received a FOC notice with a committed due date for installation of a customer's service, it is critical that the [ILEC] provide the competing carrier with a timely jeopardy notice if the [ILEC], for any reason, can no longer meet that due date."[13] The Commission should therefore adopt a "Timely Jeopardy Notifications" measurement to determine the extent to which CLECs are notified before committed due dates are missed. *See* NPRM ¶¶ 43-45. This measurement is important because it determines the reliability of the ILEC jeopardy process. Few things are more harmful to a CLEC's reputation than when it promises an installation date to a customer and then misses that commitment without having notified the customer in advance. But this is exactly what happens when an ILEC provides a due date in a FOC and then subsequently misses the date without sending a jeopardy notice. Because most such occurrences are due to no facilities problems, this measurement would be less imperative if the Commission requires facilities checks in advance of the delivery of FOCs.[14]

However, even if a pre-FOC facilities check is required, orders are sometimes placed in jeopardy later in the process. Therefore, ILECs must be required to implement an efficient jeopardy notification process. This is completely within their power to do. For example, Qwest

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[13] *Application of BellSouth Corp., BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana,* Final Memorandum Opinion and Order, 13 FCC Rcd 20599, ¶ 131 (1998) (*"Louisiana II 271 Order"*).

[14] *See* Section III.B.1.i, *supra*, for discussion of the need for mandatory facilities checks before issuing FOCs.

has implemented a procedure that improves the jeopardy process. Although it is not a perfect solution, Qwest distributes weekly spreadsheets of pending facilities jeopardy orders to keep CLECs informed of order status, and then sends the CLEC a FOC with a new due date. This is an example of a best practice that should be required for all ILECs.

In a closely related issue, many no facilities jeopardy notifications could be avoided if the ILECs were required to implement an efficient CFA change process to quickly change pairs found to be defective at the time of the conversion. SBC and Qwest have implemented practical solutions to this problem through an expedited CFA change process. Although SBC has a procedure to provide this service, its process is labor intensive, requiring paperwork and multiple telephone calls to save the customer due date. Qwest, on the other hand, has implemented a preferable system, which requires only verbal contact during the conversion process. Following the change, Qwest updates its internal database with the new facility assignment and sends the updated FOC to the CLEC. All ILECs should be required to provide an expedited CFA change process that allows pair changes on the same day as the conversion, rather than the procedure currently followed by other ILECs that requires the CLEC to issue a new local service request to change the pair.

Because this is a critical measurement to ensure that the customer impact of the delay is minimized, Allegiance proposes a 98 percent standard for 48-hours advance notice of missed due dates.

iv. FOC Interval After "No Facility" Jeopardy Notification

Once an ILEC has informed a CLEC that it cannot meet the committed due date contained in an LSRC or FOC, it is imperative that the CLEC be notified of the revised due date through a new FOC as soon as possible. CLECs must be able to reschedule installation appointments with customers in a timely manner. Customers will simply not tolerate lengthy delays for provisioning of new service from a CLEC. The Commission should therefore include "FOC Interval After 'No Facility' Jeopardy Notification" in its set of core measurements. This measurement would track the average interval between the receipt of a jeopardy notice and the subsequent receipt of a FOC for the order. Allegiance proposes a standard of 48 hours on 95 percent of orders for this measurement, which will ensure that CLECs receive nondiscriminatory service.

v. Installation Interval

ILEC failure to provide loops in a timely manner severely undermines facilities-based competition. There is broad industry consensus that this measurement is necessary for determining whether CLECs are receiving nondiscriminatory access to unbundled loops.[15] In this regard, the Commission and state commissions have found measures of timely installations to be important indicators of compliance with unbundling obligations in the Section 271 context.[16] The Commission should therefore adopt an "Installation Interval" with a benchmark standard that would ensure access to unbundled loops on just, reasonable, and nondiscriminatory terms and conditions as required by the statute.

vi. Timely Coordinated Hot Cut Conversions for UNE Loops

As a general matter, CLECs, the Commission, and states have agreed that a measurement of timely coordinated conversions is essential to quantify an ILEC's compliance with its duty to

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15 Even BellSouth has acknowledged the importance of timely installations by proposing an "Installation Interval." *See* BellSouth Nov. 2, 2001 *Ex Parte* at 3.

16 *See Texas 271 Order* ¶¶ 258, 280; *New York 271 Order* ¶¶ 281, 291.

provide nondiscriminatory access to unbundled loops.[17] This measurement is particularly important for CLECs because it ensures that end-user customers are without dial tone only for the period of time actually needed to complete the conversion. Although CLECs have little control over the hot cut process, customers understandably conclude that lengthy outages during the hot cut process are a reflection of poor CLEC service. The Commission should therefore adopt a "Timely Coordinated Hot Cut Conversions for UNE Loops" measurement with a performance standard based on the number of lines converted.

Both New York and Texas have adopted a standard under which the ILEC is allowed a full hour to cutover orders of up to nine and ten lines respectively. *See Texas 271 Order* ¶ 263, n.744; *New York 271 Order* ¶ 292. However, by grouping orders for one to five lines with orders up to nine or ten lines, these standards result in timeframes that are far longer than necessary for smaller customers. Although the ILEC may be in compliance with the state standard, small customers -- those whose livelihoods are often most seriously affected by a dial tone outage -- may be without service unnecessarily for the full hour. Thus, Allegiance's proposed standard would include more targeted standards based on the number of lines in an order, more closely aligning the standards with the time required for a cutover in industry practice. For example, 15 minutes should be sufficient time to cutover one to five lines. Alternatively, the Commission could adopt a standard of four minutes per loop.

Either of these approaches is reasonable. For example, Qwest completes hot cuts for Allegiance customers at an average interval of approximately four minutes per loop. Other

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[17] *See Texas 271 Order* ¶¶ 262-64 (discussing this measurement as adopted by the Texas commission as evidence that SWBT was in compliance with its loop unbundling obligations); *New York 271 Order* ¶¶ 292-98 (discussing this measurement as adopted by the New York commission as evidence that Bell Atlantic was in

ILECs should be held to a similar standard of quality service in the performance measurements adopted by the Commission.

vii. Delay Days on Missed Installation Due Dates

The Commission should also include “Delay Days on Missed Installation Due Dates” in the set of measurements it adopts. Again, there is broad agreement that this measurement is necessary to monitor the ILECs’ compliance with their obligation to provide UNEs. Indeed, the Commission has proposed a similar measurement in the NPRM. *See* NPRM ¶¶ 52-54. This measurement would allow CLECs to detect discrimination by tracking the additional delay imposed on a CLEC once the ILEC has already missed the due date. This would track the delay interval on the percent of LSRC/FOC dates missed by the ILEC. No current measure tracks the order after the FOC is missed. This measurement is therefore needed for a complete view of the ILEC’s compliance with its unbundling obligations.

viii. Orders Completed on Time

The Commission should adopt an “Orders Completed on Time” measurement to track the number of orders completed by the ILEC committed due date. *See* NPRM ¶¶ 48-51. It is again widely accepted that this is a critical measurement to gauge ILEC performance of their obligations to provide nondiscriminatory access to UNEs.[18] Indeed, in the *New York 271 Order*, the Commission found “the missed rate of installation appointments to be the most accurate indicator of [the ILEC’s] ability to provision unbundled loops.” *New York 271 Order* ¶ 288.

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compliance with its loop unbundling obligations). Verizon has proposed a similar measurement of “% On Time Performance - LNP/Hot Cut.” *See* Verizon Oct. 16, 2001 *Ex Parte* at 3.

[18] Even Verizon and BellSouth have recognized the importance of measurements designed to track the extent to which the ILEC meets its committed due dates. Verizon has proposed “% Missed Appointment -- Dispatch” and “% Missed Appointment -- No Dispatch.” *See* Verizon Oct. 16, 2001 *Ex Parte* at 3. BellSouth has proposed a “Percent Installation Appointments Met” measurement. *See* BellSouth Nov. 2, 2001 *Ex Parte* at 3.

Moreover, it is completely within the ILECs' power to meet their committed due dates. Accordingly, Allegiance proposes a 98 percent benchmark standard.

ix. Quality of Conversion/Installation

The Commission should adopt a "Quality of Conversion/Installation" metric to measure troubles within seven days of an installation of a new loop or of a hot cut. *See* NPRM ¶ 55. While, as mentioned, it is important that ILECs convert loops in a timely fashion, it is equally important that those loops are of comparable quality to those used in the ILECs' own networks. Carriers, the Commission, and state commissions have recognized this as a critical measurement of ILEC compliance with their unbundling obligations. *See Texas 271 Order* ¶¶ 274, 280; *New York 271 Order* ¶¶ 284, 299. In the Section 271 context, the Commission has deemed it acceptable for a state to use either seven or thirty days as the measurement period. In this case, a seven-day period, a more narrowly-tailored standard, is sufficient to achieve the measurement's purpose while eliminating unnecessary ILEC information gathering and reporting burdens. Accordingly, Allegiance proposes a performance benchmark for measurement of trouble tickets opened within seven days of conversion or installation of a loop.

x. Mean Time to Repair

The Commission, state commissions, and CLECs agree that "Mean Time to Repair" is a critical measurement of compliance.[19] "[B]ecause a reliable telephone line may be crucial for a business customer to conduct its business, the Commission has emphasized the importance of

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[19] *See Texas 271 Order* ¶¶ 206-07; *New York 271 Order* ¶¶ 220-21; *see also* NPRM ¶¶ 71-72. Indeed, both Verizon and BellSouth have voiced support for a "Mean Time to Repair" measurement. *See* Verizon Oct. 16, 2001 *Ex Parte* at 4; BellSouth Nov. 2, 2001 *Ex Parte* at 3. Moreover, Verizon proposes to disaggregate this measurement based on whether the repair is for loop trouble or central office trouble.

timely resolution of trouble reports from a competing carrier's business customers." *Texas 271 Order* ¶ 206; *New York 271 Order* ¶ 206.

Although the Commission has accepted state use of the parity standard in the Section 271 context, that standard does not in fact ensure nondiscriminatory access to the repaired UNE as required by the statute. This is because the ILECs generally will not accept a trouble ticket until a CLEC has performed an internal check to determine whether a service problem is on the CLEC's or the ILEC's network. Even when the CLEC has completed this check, the ILEC sometimes disputes the results, thereby necessitating additional CLEC checks. All of this takes time, time not incurred by an ILEC when it repairs its own facilities. It follows that parity in mean time to repair as measured from the time the ILEC opens a repair ticket to completion does not result in nondiscriminatory treatment for a particular facility in the aggregate. Thus, a benchmark standard is necessary.

Twenty hours is a reasonable benchmark for this measurement. This approach is supported by state law. Some state commissions require CLECs to issue service credits to customers whose service is not restored within a 24-hour period.[20] Where the CLEC is dependent on the ILEC to restore service, a 24-hour standard would not allow the CLEC time to process the repair order before and after the ILEC repair in sufficient time to avoid service credits. Again, the ILEC is under no such constraint with its customers and therefore would be able to use the full 24-hour period to repair service without incurring service credit obligations under the state rules.

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[20] *See* 22 Ill. Comp. Stat. 5/13-712(e)(1); 83 Ill. Admin. Code Sec. 732.30(a) (requiring a carrier to credit the customer if it fails to repair an out-of-service condition for basic local exchange service within 24 hours); Ohio Admin. Code Sec. 4901:1-5-16 (requiring customer credits for local exchange service outages).

xi. Repeat Trouble Report Rate

In addition, the Commission should include in its list of core measurements "Repeat Trouble Report Rate." *See* NPRM ¶¶ 69-70. This measurement is widely accepted as a key indicator of the quality of the initial repair, which in turn helps determine whether an ILEC is providing nondiscriminatory maintenance and repair services to its competitors.[21] As the Commission has recognized, "[a] competing carrier's customer may become dissatisfied if the customer experiences frequent service problems, especially repeated troubles." *Texas 271 Order* ¶ 209; *New York 271 Order* ¶ 222. Allegiance proposes a performance to ensure that ILECs are complying with their obligations to repair service on a just, reasonable, and nondiscriminatory basis.

xii. OSS Availability

The Commission should adopt "OSS Availability" to measure the reliability of OSS interfaces.[22] As the Commission has recognized, "nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition…." *Texas 271 Order* ¶ 99. It has further concluded that "[a] stable, reliable … interface is necessary for competing carriers to market their services and serve their customers as efficiently [as the ILEC]. The Commission previously has found that the unavailability of an interface could directly and negatively affect a carrier's interaction with its customers." *New York 271 Order* ¶ 154. It is critical that the national performance OSS availability rule track the availability of ILEC graphical user interfaces ("GUIs"). This is because CLECs are currently only able to access customer service

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[21] Verizon supports a measurement of "% Repeat Reports within 30 Days." *See* Verizon Oct. 16, 2001 *Ex Parte* at 4.

[22] Verizon has also proposed an "OSS Interface Availability -- Prime Time" measurement. *See* Verizon Oct. 16, 2001 *Ex Parte* at 3.

records ("CSRs") through a GUI in most (possibly all) regions. Electronic data interface is simply not available for this purpose. A customer's CSR lists the services that the customer purchases from the ILEC. This information is critical for a CLEC to place an accurate order with the ILEC. In Section 271 proceedings, the Commission has found state decisions setting performance benchmarks for similar measurements to be reasonable. *See Texas 271 Order* ¶ 164; *New York 271 Order* ¶ 155. Accordingly, Allegiance proposes a standard that will both ensure nondiscriminatory access to OSS and set a reasonable standard for ILEC performance.

xiii. Software Problem Resolution

Finally, the Commission should adopt a "Software Problem Resolution" measurement to track whether ILECs implement software changes on just, reasonable, and nondiscriminatory terms and conditions. CLEC access to reliable OSS systems is critical for local exchange competition. *See Texas 271 Order* ¶ 99; *New York 271 Order* ¶ 154.

CLEC software problems come in many forms. First, as the Commission has recognized, an ILEC can "impose substantial costs on competing carriers simply by making changes to its systems and interfaces" if the procedures do not allow for a smooth transition to the new systems. *Texas 271 Order* ¶ 107. Indeed, Allegiance has frequently encountered problems with software changes in which an ILEC unilaterally removes a system feature and then forces the CLEC to pursue work-arounds to perform the functions of the eliminated feature. For example, in a recent upgrade, Verizon removed the 'Service Order View' capability in its GUI. Allegiance used this feature regularly to check the status of a pending service order and work unresolved issues that could affect the due date. Verizon declined the request to add this feature back into its new release or to provide an alternate functionality.

Second, in addition to acts of commission, ILECs can degrade CLEC service through omission, namely refusal to perform upgrades where problems in the existing software systems are identified. For example, for many orders, Verizon sends a jeopardy notification to Allegiance instead of a FOC. In this situation, Verizon worked the service order through its internal systems. Although it intended to send a FOC, the jeopardy notice was sent due to system or representative error. When Allegiance identified the "jeopardy notice" and requested that Verizon send the FOC electronically, as should have been done originally, Verizon stated that its software would not allow it to send a FOC after a jeopardy notice. Furthermore when Allegiance asked Verizon to correct this problem, Verizon responded that it would work to better train its order representatives but would not modify its system to allow FOCs to be processed after jeopardy notifications. Because Allegiance relies on the FOC as its service confirmation and to schedule installation, Verizon's inability to send Allegiance a correct FOC electronically has required Allegiance to build manual processes to accommodate Verizon.

This procedure diverts CLEC resources from serving customers and pursuing competitive opportunities, a classic example of raising rivals' costs. To address this problem, Allegiance proposes separate performance standards to address software problems with work-arounds and those without.

2. Federal Reporting Requirements Should Be Modeled After State Reporting Requirements.

The Commission should also establish reporting requirements. First, federal measurements should be reported on a state-by-state basis. Federal reports should be required for any state in which the federal rules apply due to the absence of state rules or due to federal rules established to supplement inadequate state rules.[23] Where reporting requirements under the federal rules apply, separate reports for each state are appropriate because (1) an ILEC's wholesale systems may be different in different states; (2) separate reports allow for benchmarking performance; and (3) separate reporting by state makes it easy to apply one or more of the federal requirements to a state as needed under the proposal described above.

Second, reporting should be monthly under the federal rules. This is generally the requirement in the state plans because it provides regulators, competitors, and ILECs with up-to-date information on performance. With up-to-date information, poor service can be identified and corrected promptly. In addition, conforming federal reporting to the state norms makes it easier to fit federal rules into the state schemes as needed.

Third, as is generally true in the state performance plans, where parity is the relevant performance standard for a particular measurement, ILECs should be required to report separately on performance for their retail customers, competitors in general, and (subject to appropriate confidentiality) individual competitors. Where the standard is a benchmark, only the latter two reports should be required.

These reports should be provided to the Commission and to CLECs in an electronic format. To the extent that the Commission directs ILECs to post this data on their websites, they should be required to maintain historical records so that the data may be used to analyze trends and to compare past performance.

Finally, to facilitate the Commission's determination of whether measurements in place in a particular state meet or exceed the Commission's standard, the Commission should require

[23] As explained, where a state has applied a rule that meets or beats the Commission standard, state reporting requirements would take the place of federal reporting requirements.

each state commission to submit a report to the Commission detailing comparable state measurements and indicating the state's position as to whether those measurements are sufficient to obviate the need for the federal requirements.[24] States should be required to report no later than 30 days after publication of the order in the Federal Register so that the information gathering and reporting requirements may be implemented as expeditiously as possible. Furthermore, states must be under an affirmative obligation to notify the Commission of changes to their performance measurements and standards so that the Commission may determine whether the state or federal rules continue to apply in the state at issue.[25]

C. The Commission Should Employ Federal Performance Rules As The Basis For Federal And/Or State Self-Enforcing Penalties As Well As Federal Enforcement Proceedings.

As the Commission well knows, the states have taken the lead in developing and enforcing comprehensive performance assurance plans ("PAPs") just as much as they have led in the establishment of performance rules. The PAPs established in state Section 271 proceedings generally include automatic financial penalties paid to CLECs and the state treasuries when the ILEC fails to meet specified levels of performance. As Allegiance has argued in past Section 271 proceedings, these PAPs are by no means perfect, especially since the financial penalties are not significant enough in most cases to act as a complete deterrent.[26] Nevertheless, as the

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[24] This approach would be similar to the Commission's slamming rules under which states were required to notify the Commission of their intent to "opt in" to accept the primary responsibility for administering the federal slamming liability rules and resolving slamming complaints. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, First Order on Reconsideration, 15 FCC Rcd 8158, ¶ 29 (2000) ("*Slamming Liability Order*").

[25] *Cf. id.* ¶ 30 (requiring states to notify the Commission if they choose to discontinue administering the federal slamming liability rules).

[26] *See* Kansas-Oklahoma Section 271 Application of SBC, CC Docket No. 00-217, Comments of Allegiance Telecom, Inc. at 37-39 (filed Nov. 15, 2000) (explaining that the potential liability measures in the PAP are not significant enough to ensure compliance); New York Section 271 Application of Bell Atlantic, CC Docket No. 99-

Commission has found, the PAPs do increase the costs to ILECs of discrimination and unreasonable service. In addition, many states continue to refine their PAPs in light of practical experience.

Furthermore, as with performance rules, many states are especially well-placed to adopt and implement PAPs. First and foremost, as mentioned, a critical aspect of these plans is usually that the ILEC must make automatic penalty payments to the state treasury when its performance levels drop below defined thresholds. Such mechanisms appear to be easier to adopt under at least some state statutes than at the federal level. Second, many of the state PAPs include requirements that the ILEC pay competitors liquidated damages when its performance drops below a defined threshold. Again, this appears to be something that is easier to adopt and implement under at least some state statutes than at the federal level. Finally, as with performance rules, the states' more detailed knowledge of ILEC wholesale systems and their responsibility for arbitrating and approving interconnection agreements give them certain insights as to how PAPs can be most effectively targeted to problem areas in the wholesale system. Most importantly, the states' hands-on experience keeps them informed as to changes in the wholesale processes and allows them to make timely adjustments to PAPs when appropriate. Given that the Commission does not have the same level of exposure to these issues as the states and that the Commission must oversee all states at the same time, it is not as well-placed as the states to make these changes.

Thus, in light of their progress and their comparative advantages, the Commission should continue to let the states take the lead in establishing rules for self-effectuating penalties. But the

295, Comments of Allegiance Telecom, Inc. at 17 (filed Oct. 19, 1999) (noting that the New York PAP provides for insignificant financial penalties).

Commission should strongly encourage *all* states to adopt PAPs. Moreover, because of the states' comparative advantages in this area, the Commission should rule that state performance penalties may apply where an ILEC has failed to meet the standards set forth in federal rules that may apply in the state (*i.e.*, where a state has not established rules that meet or beat the federal standards).[27]

Nevertheless, the Commission cannot rely solely on the states to establish financial penalties for poor ILEC wholesale service. Where a state fails to adopt a PAP or where even a comprehensive state PAP fails to deter ILEC anticompetitive behavior, federal penalties must apply. In its Section 271 orders, the Commission has applied a "zone of reasonableness" standard to determine whether a state PAP will prevent BOC backsliding after Section 271 approval. Under this test, the Commission generally determines whether a state PAP includes: (1) potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; (2) clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; (3) a reasonable structure that is designed to detect and sanction poor performance when it occurs; (4) a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and (5) reasonable assurances that the reported data is accurate.[28] The Commission

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27 In practice, it seems unlikely that this scenario would arise often. Where a state has gone to the trouble to establish a PAP, it would seem likely that it will have at least established performance measurements and associated standards that match the federal rules.

28 *New York 271 Order* ¶ 433; *see also Texas 271 Order* ¶ 423 (explaining that key elements of PAPs are reviewed to determine if they fall within a zone of reasonableness); *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 273 (2001) (explaining that the Commission "examined certain key aspects" of the PAPs to determine if they fall within a zone of reasonableness) (*"Kansas-Oklahoma 271 Order"*), *remanded on other grounds sub. nom., Sprint Communications Co. v. FCC,* 274 F.3d 549 (D.C. Cir. 2001).

should not apply federal self-enforcing penalties in a state with a PAP that meets these criteria. However, since the data reported under state rules must be available for Commission enforcement proceedings, the Commission should expressly require that a state PAP does not meet the fifth prong of the standard unless the ILEC's performance data reported under state rules is subject to regular audits, with severe penalties applicable where inaccuracies are found. Moreover, the Commission should establish a presumption that a PAP that has been deemed to fall within the zone of reasonableness when applied to an ILEC in one state, would also meet Commission approval when adopted by another state in which the ILEC uses the same wholesale processes (subject to appropriate adjustments in the levels of the fines to correspond with the amount of revenue the ILEC earns in the adopting state).

If the Commission determines that a state has not adopted a PAP that meets the zone of reasonableness standard, and that it has not initiated a proceeding that is likely to lead to the creation of such a PAP, the Commission should establish self-executing penalties for the state. The specifics of such a plan should be addressed if the need arises. General guidelines, however, are worth describing. The self-effectuating federal penalties should take the form of waivers of recurring and nonrecurring charges for wholesale inputs purchased by CLECs from ILECs. Where an ILEC fails to meet a federal performance standard for a particular CLEC in a month, the ILEC should be required automatically to waive charges to the CLEC for the affected inputs (*e.g.*, loops, transport, and so on). Where an ILEC fails to meet the federal standards for a particular measurement in a month for all CLECs combined, that failure should trigger additional waivers for all CLECs on the affected inputs (loops, transport, etc.). The extent of the waivers of recurring and nonrecurring charges should depend on the severity and frequency of the ILEC's failure to meet the performance standards. Finally, the Commission should also include self-enforcing payments by ILECs to CLECs in addition to the waivers described above in cases of severe and frequent failures to meet performance standards. Where a state penalty would also apply, that penalty amount would be subtracted from the federal amount.

In addition, for all states and regardless of whether a state or federal PAP applies, the Commission should determine whether the ILECs have consistently met the federal performance standards.[29] That is, although a state's performance measurements, standards, and reporting requirements may apply in a particular state for purposes of the PAP, federal standards would apply for purposes of federal forfeiture proceedings (as well as Section 208 proceedings as discussed below). The relevant federal performance standard would simply be applied to the performance published in the state report.

Specific procedures and guidelines should be established for federal forfeitures arising out of failure to meet the federal standards. To begin with, in any month in which an ILEC misses the relevant standard, the presumption should be that the existing PAP (whether federal or state) has not adequately deterred ILEC anticompetitive behavior. Thus, in such cases the Commission should automatically issue a notice of apparent liability ("NAL") to the ILEC, seeking a forfeiture designed to make the conduct in question unprofitable. Only exigent circumstances (*e.g.*, natural disasters) would be grounds for not imposing a forfeiture on the ILEC. In addition, the Commission should establish and publish guidelines setting forth the size of forfeitures that it will seek, depending on the magnitude and frequency of an ILEC's failure to comply with federal standards.

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[29] Of course, the Commission must also ensure that it fulfills its responsibility to enforce the requirements of Section 251 in all states, regardless of whether a particular state has adopted a PAP. The discussion herein simply focuses on the interface between forfeiture proceedings and penalties under PAPs (whether state or federal) where they apply.

Finally, the Commission must make its Section 208 complaint process available to competitive carriers seeking redress for poor service in the provision of UNEs, interconnection, and collocation. The absence of Commission performance rules has effectively made the Section 208 process unavailable for such claims. Again, once such rules are in place, state or federal reporting requirements should allow potential complainants to determine easily whether an ILEC has met its obligations under the federal standards. Where payments under PAPs have not adequately compensated a CLEC for sub-standard performance, additional monetary damages should be awarded.

D. The Commission Should Establish Independent Reviewers Of ILEC Compliance With Section 251.

In order for oversight and enforcement in the area of local competition to be truly effective, there is a need for sustained and comprehensive scrutiny of an ILEC's behavior as a whole. Such ongoing scrutiny would have several critical functions. First, it is very important that a clearinghouse be established for the prompt collection and review of state performance reports covering wholesale functions not addressed by federal performance rules.

Second, as the NPRM implies, effective performance rules and penalties applicable to one part of the wholesale process will give the ILECs the incentive to seek other means of engaging in non-price anticompetitive behavior. This is likely to lead to complaints from competitors that functionalities that worked in the past have suddenly stopped working. It is critical that the Commission stay informed about such developments. Moreover, it is also important that the Commission have access to experts who understand the ILECs' wholesale systems and who can meaningfully test wholesale processes to determine whether an ILEC has begun to discriminate in an area not adequately covered by the existing performance rules. Such behavior must be met with stiff forfeitures. But forfeitures are unlikely to be imposed in a timely manner, if at all, in the absence of consistent expert oversight, including third-party testing conducted by such experts. It would also be difficult for federal regulators to know when and how to change the performance rules quickly to address problems such as these in the absence of expert oversight.

Third, the ILEC networks and competitors' wholesale needs change over time. Such changes offer the ILECs classic opportunities to deny, delay, and degrade the inputs needed by CLECs. The Commission will not be able test and assess in any detail the extent to which the ILECs are exploiting such opportunities. Nor is the Commission likely to have adequate information as to how performance requirements should be adjusted to account for ILEC strategic behavior.

Because it is highly unlikely that the Commission can accomplish these critical tasks on its own, the Commission should establish one panel of experts to conduct periodic reviews of the ILECs' performance in each of the original BOC regions. These panels would provide quarterly reports to the Commission concerning ILEC behavior, focusing on the areas outlined above. The Commission should rely on these reports to trigger investigations. The third-party reviews should also include suggestions as to how performance rules in the states and at the federal level can be improved, either by the addition, elimination, or refinement of performance requirements. The ILECs would be responsible for compensating the experts (as they would with any other outside auditors).

In this regard, the review of ILEC performance is somewhat similar to other areas in which the Commission has relied (both pursuant to statutory mandates and as a matter of its discretion) on experts, such as the Justice Department in Section 271 proceedings and the North

American Numbering Council for numbering issues.[30] Moreover, independent review has become an integral part of overseeing compliance by dominant firms with regulations designed to prevent them from acting on inefficient incentives.

For example, the Consent Agreement entered by AOL-Time Warner and the Federal Trade Commission ("FTC") to remedy anticompetitive effects of the AOL-Time Warner merger requires the FTC to appoint a Monitor Trustee to ensure AOL-Time Warner's compliance with the Consent Agreement through third-party monitoring and reporting.[31] Under the terms of the Consent Agreement, the FTC imposed conditions to eliminate the opportunity and incentive of the merged AOL-Time Warner to discriminate against unaffiliated cable ISPs in favor of its own cable broadband ISP affiliate. The Monitor Trustee is responsible for monitoring compliance generally and reporting in writing to the FTC thirty days after he assumes his duties and every ninety days thereafter until the Consent Agreement terminates. The Monitor Trustee may request additional orders or directions from the FTC as may be necessary to assure compliance. To complete these duties, the Monitor Trustee has been granted extensive power and authority, including access to all AOL-Time Warner personnel, records, and documents needed to monitor compliance with the conditions. AOL-Time Warner is required to assist with all reasonable requests by the Monitor Trustee and is under an affirmative duty to take no action to interfere with or impede the Monitor Trustee's performance. The Monitor Trustee serves at the expense of AOL-Time Warner with oversight of expenses by the FTC.

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30 *See* 47 U.S.C. § 271(d)(2)(A) (requiring the Commission to consult with the Attorney General on Section 271 applications); 47 C.F.R. § 52.11 (describing the duties of the North American Numbering Council to include advising the Commission on matters related to numbering administration).

31 *In re America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders, Decision and Order, 2000 WL 1843019 (FTC) (Dec. 14, 2000) ("Consent Agreement").

Similarly, the proposed Consent Decree in the pending antitrust case against Microsoft provides for third-party oversight by a three-person Technical Committee ("TC") to assist in enforcement of and compliance with the conditions contained in the Consent Decree.[32] The Consent Decree imposes a variety of conditions on Microsoft in order to remove its opportunity and incentive to interfere with the competitive efforts of rivals through various anti-competitive practices in which it has engaged in the past. TC members will be experts in software design and programming and must not have conflicts of interest that could prevent the members from performing the duties in a fair and unbiased manner. Under the Consent Decree, the TC will be required to report in writing to the plaintiffs every six months on the actions it has taken to fulfill its responsibilities including identification of business practices reviewed and recommendations made by the TC, and to immediately notify plaintiffs in writing of a failure by Microsoft to comply with any provision of the Consent Decree. In addition, the TC will have the authority to monitor Microsoft's compliance and to receive complaints by the compliance officer, third parties or the plaintiffs. In order to fulfill these responsibilities, the TC has been granted broad access to Microsoft personnel, documents, and source code and operates at the expense of Microsoft with appropriate oversight of expenses by the court.

These expert panels have been deemed necessary to oversee the behavior of dominant firms in complying with behavioral rules designed to reduce their opportunities to exploit that dominance in anticompetitive ways. In those cases, as here, the behavioral rules apply in technologically complex and dynamic environments where discrimination is sometimes difficult

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[32] *United States v. Microsoft Corp.*, Revised Proposed Final Judgment and Competitive Impact Statement, 66 FR 59452, 59456-57 (Nov. 28, 2001) ("Consent Decree").

to detect. There is simply no other appropriate way to ensure that firms like the ILECs are meeting the letter and spirit of the relevant behavioral requirements over time.

E. The Rules Adopted In This Proceeding Should Apply To Tier I ILECs And Should Not Apply To Non-Incumbent LECs Or Other Non-Dominant Carriers.

The federal performance rules and penalties should apply only to Tier I ILECs. The Commission has used the Tier I classification as the cutoff for a variety of regulatory requirements, such as the mandatory application of certain ARMIS reporting requirements and expanded interconnection obligations.[33] In so doing, the Commission's basic judgment has been that carriers that meet the Tier I criterion (which is currently annual revenues of $117 million of above) are large enough to be able to comply with requirements that are otherwise in the public interest without incurring undue hardship.[34] There is every reason to reach the same conclusion here. For example, Tier I ILECs are already subject to the more detailed ARMIS reporting requirements. They therefore have in place the capabilities needed to provide the reports that would be required by state and federal rules adopted under the proposal described herein.

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[33] See *Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 1 (1992), *vacated on other grounds, Bell Atlantic Telephone Companies v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994) (requiring Tier I LECs to provide expanded interconnection to any interested party) ("*Expanded Interconnection Order*"); *Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules)*, Report and Order, 2 FCC Rcd 5770, ¶ 4 (1987) (adopting annual automated reporting requirements for Tier I carriers); *see also Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules)*, Report and Order, 60 Rad. Reg. 2d (P&F) 1111, ¶ 109 (1986) (retaining a two-tiered system for accounts and financial reporting requirements under 47 C.F.R. § 32.11, where the Class A carriers are defined according to the same criteria as Tier I carriers).

[34] *See, e.g., Expanded Interconnection Order* ¶¶ 8, 18 (noting that the LECs should be able to adjust to the new special access pricing without any undue hardship, and that the benefits of expanded interconnection for interstate special access service will outweigh any drawbacks).

In no event, however, should any performance rules or penalties apply to non-incumbent LECs or any other non-dominant carrier.[35] Nothing is more fundamental to the theory of regulation than the concept that regulation does more harm than good when imposed in a context where market forces can be relied on to ensure efficient behavior. This is just such a case. As non-dominant firms, CLECs have no incentive or ability to raise their rivals' costs by degrading the quality of wholesale inputs. To the extent that a CLEC's service quality is poor, purchasers will simply switch to another carrier. ILECs, of course, can degrade the quality of inputs purchased by CLECs because no alternative suppliers of those inputs exist. It is this fundamental difference that caused the Commission to decide that it simply made no sense to impose service quality performance measurements and standards on new entrants when long distance competition began to develop. As the Commission concluded at that time, a "customer's ability to switch to another provider of service" gives competitive carriers a "significant incentive . . . to enhance their competitive position," thereby making service quality regulation unnecessary.[36]

This logic also formed the basis of the Commission's *Competitive Carrier* orders. In that proceeding, the Commission relied on two basic and widely accepted theoretical propositions. First, it concluded that carriers have the opportunity and incentive to engage in anticompetitive behavior only where they have market power.[37] Second, it concluded that "regulation of business conduct imposes costs." *Competitive Carrier First Report and Order* ¶ 11. To

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[35] *See* NPRM ¶ 23 n.39 (citing Verizon's argument that performance requirements should apply to all local telecommunications providers, including competitive LECs).

[36] *See Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, Final Report and Order, 78 FCC 2d 1291, ¶ 7 (1980).

[37] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof*, First Report and Order, 85 FCC 2d 1, ¶ 10 (1980) (*"Competitive Carrier First Report and Order"*).

eliminate unnecessary and costly regulation, the Commission therefore classified carriers according to "their dominance or power in the marketplace" and set out to "apply different regulatory rules to each." *Id.* ¶ 15. The Commission has since applied detailed regulations designed to diminish opportunities to engage in price and non-price anticompetitive behavior only to dominant firms. Moreover, the local competition provisions of the 1996 Act reflect this basic logic, as they apply special interconnection, unbundling, resale, collocation and other similar obligations only to the ILECs. *See* 47 U.S.C. § 251(c).[38] Thus, CLECs do not and need not provide most of the functionalities at issue in this proceeding. It is therefore completely unnecessary and would be affirmatively harmful to consider further the imposition of performance rules of any kind on CLECs or any other non-dominant carriers.

F. The Commission Should Review Its Rules At Regular Intervals.

As the inputs needed by competitors change, the ILECs' incentives and opportunities for discrimination will change. The states will have the flexibility to adjust their rules to address these issues. But the Commission should review its rules periodically to incorporate new best practices developed by the states and to follow-up on recommendations made by independent expert panels. During its regular reviews, rules can be added to address functionalities that have become necessary for competitive development, and rules that are no longer necessary or effective can be eliminated. Moreover, these proceedings will offer states an opportunity to share their views with the Commission as to how to promote increased national uniformity by extending the application of best practices in measurements and standards.

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[38] While the Commission has imposed regulations on CLEC prices in certain contexts since the passage of the 1996 Act, that has only been in the context of perceived market failure. *See Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001)*; Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001). There is no evidence of such a market failure here.

IV. THE COMMISSION HAS THE AUTHORITY TO ADOPT THE PERFORMANCE RULES AND PENALTIES PROPOSED HEREIN.

As the Commission explains in the NPRM, there is little doubt that, under the Supreme Court's decision in *AT&T v. Iowa Utilities Board*,[39] the Commission has the authority to establish rules defining exactly what an ILEC must do to comply with the nondiscrimination and just and reasonable requirements of Section 251(c). NPRM ¶¶ 6, 68. The Commission also has the authority under Section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). This provision grants the Commission the authority to take such other actions as are necessary to ensure that the ILECs comply with the nondiscrimination and just and reasonable requirements of Section 251.

Under Section 4(i), the Commission may require the ILECs to comply with reporting requirements. The Communications Act clearly contemplates that carriers will be subjected to reporting requirements.[40] The reports at issue here are a natural and necessary extension of the performance rules and standards designed to ensure compliance with Section 251(c), since the ILECs are uniquely placed to produce accurate reports for their retail and wholesale customers.

The Commission should and may refrain from interfering with the enforcement of state rules that are at least as effective as the relevant federal rules in defining and enforcing the requirements of Section 251. Where the Commission can be confident that the requirements of the statute have been met, it is free to stay the hand of federal regulation. This is exactly the approach adopted in the *Bell Atlantic-GTE Merger Order*, where the Commission ruled that the

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39 525 U.S. 366, 377-78 (1999).

40 *See* 47 U.S.C. § 219 (giving the Commission the power to require annual and other reports).

merger conditions would sunset in a state that developed a "comprehensive" performance reporting and enforcement plan.[41] This is also similar to the approach taken by the Commission where it mandated performance benchmarks for collocation under Section 251(c)(6). *See* 47 U.S.C. § 251(c)(6). In that context, the Commission established national performance standards applicable in the absence of state performance standards.[42] This general approach is also the essence of the Commission's numerous decisions, beginning with the *Competitive Carrier* proceeding discussed above, to forego regulating nondominant carriers based on the logic that market forces can more effectively ensure just, reasonable, and nondiscriminatory prices and conduct. Where state law similarly ensures compliance with the requirements of Section 251(c), the Commission may abstain from regulating.

There is also nothing novel about allowing the states to enforce federal regulations (even in the absence of a specific statutory mandate allowing states to do so). This would be the case where state PAPs impose penalties for ILEC failure to meet federal performance rules. The Commission did exactly this when it left critical aspects of implementation and enforcement to the local franchising authorities in the early stages of cable regulation.[43] There, the Commission determined that federal licensing of the cable industry, without state or local involvement, would

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41 *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 282 (2000) ("*Bell Atlantic-GTE Merger Order*").

42 *See Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Order on Reconsideration, 15 FCC Rcd 17806, ¶ 33 (2000) (establishing default federal standards applicable unless a state adopts a standard of any kind -- either more or less stringent than the federal default) (*"Collocation Standards Order"*).

43 *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals*, Cable Television Report and Order, 36 FCC 2d 143, ¶ 11 (1972), *aff'd on other grounds*, *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975) (*"Cable TV Report and Order"*).

"place an unmanageable [administrative] burden on the Commission," and would ignore the knowledge and expertise that local governments could offer to the regulatory process. *Cable TV Report and Order* ¶ 177. The Commission found that "local authorities are able to bring a special expertness to such matters. . . . Local authorities are also in a better position to follow up on service complaints." *Id.* For example, the Commission established general technical standards for service quality, while local entities were allowed to make specific substantive decisions, such as establishing programs to maintain quality of service and review complaints, thereby allowing the local governments to enforce the federal regulations. *Id.* ¶ 183; *see also id*., Appendix C, at 325.

More recently, the Commission adopted a similar approach to enforcement of the federal slamming liability rules. In that proceeding, the Commission allowed states to assume the primary responsibility for administering the federal slamming liability rules and resolving slamming complaints. *See Slamming Liability Order* ¶ 24. Although the statute did not expressly delegate authority to the states for enforcement with respect to interstate services, the Commission found support for its approach in the spirit of the law.[44] The Commission reached its conclusion, in part, based on the expertise state commissions had gained through extensive experience with consumer slamming complaints. *See Slamming Liability Order* ¶ 25. Moreover, even though it continues to accept informal slamming complaints from consumers in states that have opted into enforcement, the Commission generally does not adjudicate those complaints, but instead refers them "to the appropriate state commission for resolution." *See id.* ¶ 28.

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[44] *See* 47 U.S.C. § 258(a) ("Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services."); *Slamming Liability Order* ¶ 24 ("The language of Section 258 itself *contemplates* a state and federal partnership to deter slamming") (emphasis added).

Furthermore, to the extent that the Commission is forced to intervene to establish a PAP in a state, this too is well within its authority. A federal PAP would essentially be an incentive plan in which the Commission would adjust rates charged by ILECs for the inputs set forth in Section 251. The Commission has in the past established pricing regimes designed to improve ILEC incentives. For example, price caps were imposed on the BOCs and GTE (they were optional for other ILECs) as a means of giving the ILECs the incentive to function more efficiently. The Commission described the policy underlying price caps as follows:

> In designing an incentive-based system of regulation for the largest LECs, our objective, as with our price caps system for AT&T, is to harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.[45]

The profit-making incentives were harnessed by essentially forcing ILECs to pay the financial consequences of inefficiency that would apply in a competitive market. The price cap in most cases functioned as the maximum level the ILEC could charge without losing revenues, just as would be the case in a competitive market. On the other hand, the ILEC could make more money, again as in a competitive market, by continuing to charge rates at the price cap levels while at the same time lowering costs. The Commission found authority to adopt this incentive scheme in the Section 201(b) requirement that common carriers provide interstate service at just and reasonable rates.

Similarly, the Commission has authority under Section 251(c) to establish an incentive plan to ensure that wholesale inputs are provided on just and reasonable terms and conditions. Paragraphs (2) (interconnection), (3) (UNEs), and (6) (collocation) of Section 251(c) all give the

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[45] *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 2 (1990), *aff'd, Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

Commission the authority to ensure that the ILECs provide the inputs described therein on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." The performance plan here is a necessary exercise of the Commission's discretion under Section 4(i) to ensure that the "terms and conditions" under which ILECs provide the inputs are just, reasonable, and nondiscriminatory. Just as price caps result in financial penalties (in the form of lower profits) for ILECs that do not keep their costs under control, so the waiver of charges for Section 251(c) inputs would replicate the lost profits that would follow if the ILEC were to fail to provide an adequate level of service quality in a competitive environment. Moreover, while this incentive regime may well affect the price that a CLEC ultimately pays for an input under Section 251(c), the rules proposed herein do not set the *rates* for interconnection, UNEs, or other affected inputs. Those rates are established by the states pursuant to Section 252(d). An ILEC would remain free to charge those rates so long as it otherwise provided service on terms and conditions that were just, reasonable, and nondiscriminatory. The waivers of recurring and nonrecurring charges would only apply if the terms and conditions of service were unjust, unreasonable, or discriminatory.

Finally, to the extent that waivers and additional payments made by ILECs to CLECs are considered penalties for failure to meet federal rules, here again the Commission has authority to act. Section 206 of the Act states that

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in the Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this [Act]…

47 U.S.C. § 206. Damages must be ordered pursuant to a "hearing." *See* 47 U.S.C. §§ 207, 209. But it is well-established that rulemakings can meet statutory "hearing" requirements where the issues are generic and where specific factual circumstances affecting different carriers are not implicated.[46] This is just such a situation. The minimal level of competitor damages caused by ILEC failure to meet performance standards could easily be established in advance, based on the price the CLEC would pay for the input in question, the costs CLECs must generally incur (in terms of employee time spent with customers and the ILEC) as a result of bad ILEC service, and lost reasonable profits. ILECs would be on adequate notice that such penalties would be triggered in the event the ILEC's own data shows that it fails to meet the applicable performance standard. Any due process concerns should therefore be fully addressable in this rulemaking proceeding.

V. THE BENEFITS OF PERFORMANCE RULES AND PENALTIES AS DESCRIBED HEREIN OUTWEIGH ANY POTENTIAL ASSOCIATED COSTS.

The regulatory regime proposed herein will increase the likelihood of detection and punishment of ILEC non-price discrimination. This will in turn reduce the ILECs' incentives and opportunities to engage in this kind of behavior. Moreover, while the focus of this proceeding must first and foremost be to ensure ILEC compliance with their legal obligations, the instant proposal will accomplish this goal without imposing significant new regulatory burdens on the industry.

A. The Benefits Of The Rules Proposed Herein Would Be Very Significant.

Clear and comprehensive performance rules and associated self-enforcing penalties yield substantial benefits. The Commission has repeatedly concluded that performance measurements,

46 *See American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 21-23 (2d Cir. 1978).

reporting requirements, and standards with self-executing penalties comprise the most effective means of enforcing the behavioral requirements of Section 251.[47] Clear performance rules make detection and proof less expensive and less time-consuming; self-enforcing penalties make punishment more swift and certain.[48] As a result, ILECs' incentives and opportunities to raise their rivals' costs through discrimination and strategic use of the regulatory process are reduced.

Clear performance rules combined with quarterly third-party expert report cards would also make it possible for the Commission to use its forfeiture proceedings to supplement penalties applicable under the PAPs. Guidelines for penalties and automatic issuance of NALs for defined levels of wholesale performance would make increased punishment more certain, thus increasing deterrence. Moreover, to the extent CLECs are not adequately compensated for discrimination in PAPs, national performance rules would make the Section 208 complaint process available for local competition disputes for the first time.[49]

Clear performance rules also provide ILECs greater clarity as to what they must do to meet their statutory obligations. There may be a significant number of situations in which the ILECs fail to perform in a manner that is adequate simply because they do not know what the relevant standard is.

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[47] *See, e.g., New York 271 Order* ¶ 429 (noting that the performance monitoring and enforcement mechanisms provide strong assurance that the local market will continue to be competitive after Bell Atlantic receives Section 271 approval); *Kansas-Oklahoma 271 Order* ¶ 269 (finding that "the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence" that local markets will remain open after the BOC receives Section 271 approval); *Bell Atlantic-GTE Merger Order* ¶ 332 (noting that the compliance and enforcement mechanisms will create a strong incentive for Bell Atlantic/GTE to comply with the merger conditions).

[48] Schwartz at 267-68 (observing that under the current requisite standard, proving BOC abuses may be too costly or simply infeasible, and that correcting abuses must be done quickly and effectively before they are impossible to reverse).

[49] *See Ex Parte* Letter from Jason Oxman, Covad Communications Company, to Magalie Roman Salas, FCC, CC Docket No. 96-98, at 1-2 (Oct. 1, 2001) (explaining that Covad cannot successfully bring complaints for the ILECs' discriminatory conduct in the absence of performance measurements and standards).

The proposal described herein would cause these beneficial effects to be spread to wholesale activity across the country, to states without performance rules, and to functionalities to which some state performance rules do not currently apply. In essence, the result would be to extend best practices developed primarily in Section 271 proceedings to areas that have not yet experienced and (absent regulatory intervention) may never experience such benefits (either because a particular ILEC is not subject to Section 271, such as Verizon West and SNET, or because the benefits of Section 271 approval have not been significant enough in a particular state to give the BOC the incentive to meet the requirements of the Section 271 checklist).

The proposal described herein also provides a mechanism for meaningful oversight of ILEC wholesale behavior in the future. Currently, the only remotely effective federal mechanism for overseeing wholesale performance is Section 271, which at best creates a temporary incentive for BOCs in some states to meet the requirements of the Act. There is a very important need to ensure that ILECs' incentives and opportunities for anticompetitive behavior are reduced on a going-forward basis. The Commission has a responsibility under Section 271(d)(6) as well as Section 251(c) to ensure that this occurs. *See* 47 U.S.C. §§ 251(c), 271(d)(6). Moreover, since states retain considerable flexibility in the manner in which they enforce the Act under the proposal described herein, there is a chance for best practices to be developed in the future. Through the use of expert panel reports and the Commission's periodic review of its performance requirements, the Commission can spread best practices across the country.

More generally, by making regulation more effective in forcing ILECs to meet their statutory obligations and to refrain from raising their rival CLECs' costs, the performance rules and penalties described herein will increase the likelihood that facilities-based competition will continue to spread. The dynamic efficiencies that such competition will deliver are likely to be very significant. These efficiencies include lower cost curves, as competitors would spend fewer resources on obtaining inputs from the ILECs and therefore more resources on investing in their own facilities. Investment in facilities will also lead to increased innovation and, ultimately, the elimination of regulation.

By establishing federal rules defining certain core Section 251(c) obligations, the Commission will also promote greater uniformity among state requirements applicable to the ILECs. It is important to point out that the ILEC rhetoric regarding the number and diversity of performance rules they must meet has been highly misleading. To begin with, states in which the BOCs have the same wholesale operations generally have adopted very similar, if not identical, performance rules. This is true for example in the SBC region. The differences in performance rules tend to exist among states where an ILEC has deployed different wholesale operations. The ILECs have actively participated in the collaborative processes that led to the adoption of these rules and in fact have generally requested different performance rules in states with different wholesale systems. Moreover, the overlap between Commission performance rules established as merger conditions and state performance rules is fairly limited. The *Bell Atlantic-GTE Merger Order* conditions sunset in states that adopt "comprehensive" performance rules and penalties, even before Section 271 approval is granted in the state. *See Bell Atlantic-GTE Merger Order* at Appendix D, ¶ 17. In fact, the Common Carrier Bureau recently removed the merger performance reporting and penalty conditions in Illinois and Ohio, based on the Bureau's conclusion that the PAPs in those states were "comprehensive."[50] Furthermore, the

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[50] *See* Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Jeff Ward, Sr. Vice President -- Regulatory Compliance, Verizon Communications, DA 02-14 (rel. Jan. 8, 2002).

merger conditions for both Bell Atlantic-GTE and SBC-Ameritech also sunset upon the grant of Section 271 authorization in a state where such approval is required to enter the in-region long distance business. *See id.; see also SBC-Ameritech Merger Order* ¶ 380.

In any event, to the extent that there are legitimate concerns regarding state requirements that are unnecessarily dissimilar, federal guidance as to the meaning of certain Section 251(c) obligations should help address that problem. By functioning as a clearinghouse for best practices, the Commission's rules can comprise a list of best practices that may well emerge as the preferred rules for the states. Thus, the more effectively the Commission captures best practices in its rules, the more likely it would seem that such rules will emerge as the national standard and the more likely it is that any inefficiencies caused by differences in state rules will be diminished or eliminated.

Finally, greater uniformity in performance rules will make it easier to benchmark ILECs' performance in different states, thereby improving enforcement at the state and federal levels. Indeed, the Commission has recognized benchmarking as one of the most important regulatory tools available. *See Bell Atlantic-GTE Merger Order* ¶ 332 ; *SBC-Ameritech Merger Order* ¶ 406.

B. The Costs Of The Performance Rules And Penalties Proposed Herein Would Be Relatively Minor.

There is no sense in which the rules proposed herein can be characterized as inefficient or unnecessarily regulatory. They would not, for example, add an additional layer of federal reporting on top of existing state requirements that apply to the ILECs. Instead, the rules proposed here would merely parallel existing state reporting requirements or fill holes in the current state reporting regimes. They would not therefore impose the kind of duplicative regulations that the Commission seeks to avoid.

While the performance rules suggested herein would not necessarily be consistent with the existing merger condition requirements, that is unlikely to be a significant issue given the automatic sunset mechanisms applicable to those requirements. Moreover, the Commission should stipulate that any state PAP that meets the "zone of reasonableness" standard or that is imposed by the Commission *in lieu* of a state plan should qualify as "comprehensive" under the *Bell Atlantic-GTE Merger Order* and therefore cause the Bell Atlantic-GTE merger conditions to sunset in that state.

By leaving most of the responsibility for application and enforcement of the requirements to the states in the first instance, the Commission's administrative burden would not be significantly increased. The use of third-party expert panels would keep the Commission's fact-gathering and oversight responsibilities at a minimum. To the extent that a federal PAP must be developed, that process would require a detailed proceeding. But once the PAP is in place, the self-enforcing nature of the penalties would keep the Commission's responsibilities at a minimum going-forward. The use of automatic forfeiture proceedings to supplement state or federal PAPs would also involve primarily the initial effort of establishing the triggers for forfeitures and guidelines for forfeiture amounts.

Nor would the states have significant additional responsibility. Many (possibly most) states have conducted, are conducting, or plan to conduct PAP proceedings already. The incremental burden on the states of ensuring that those plans mesh well with the federal requirements is relatively small. Moreover, given their related responsibilities under Section 252, the states can take on this responsibility more efficiently than the Commission. Finally, most small states have the option of simply adopting a modified version of an "anchor state" PAP.

VI. CONCLUSION

For the reasons described herein, the Commission should adopt performance measurements, standards, reporting requirements, and penalties in accordance with the proposal described herein.

Respectfully submitted,

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APPENDIX A
NATIONAL PERFORMANCE MEASUREMENTS